

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT OF
PUBLIC SAFETY,

Petitioner,

vs.

BRANNON W. HARTSELL,

Respondent.

No. 12-2226 PO

DECISION

The Director of the Department of Public Safety (“the Director”) has cause to discipline the peace officer certification of Brannon W. Hartsell because he committed a criminal offense, and because he committed an act while on active duty that involved the reckless disregard for the safety of a suspect.

Procedure

On December 18, 2012, the Director filed a complaint seeking to discipline the peace officer certification of Hartsell. On January 16, 2013, Hartsell filed an answer. On July 30, 2013, by leave of the Commission, Hartsell filed his first amended answer. We held a hearing on March 13, 2014. Richard D. Crites of The Crites Law Firm represented Hartsell. The Director was represented by Assistant Attorney General Ron Dreisilker. The case became ready for our decision on August 12, 2014, the date the last written argument was filed.

Findings of Fact

1. Hartsell holds a peace officer license issued by the Director on June 11, 2009, which was current and active at all relevant times.
2. Between August 2008 and June 2009, as an attendee and of the Missouri Sheriffs' Association Training Academy, Hartsell was instructed and trained on emergency vehicle operation and police pursuit techniques. The training he received was not extensive.

Events of August 26, 2012

3. On August 26, 2012, Hartsell was on duty as a police officer working for the Aurora Police Department.
4. At approximately 4:30 a.m., Hartsell was dispatched to a location in Aurora to investigate a complaint of a suspicious person in the area.
5. When Hartsell arrived, he encountered an adult male riding a motorbike on the street wearing a bandana covering the lower part of his face below the eyes. The rider, Guy William Newton, was not wearing a helmet.
6. Hartsell attempted to make contact with Newton, but he fled on the bike.
7. Hartsell activated his emergency lights and siren and followed Newton for a few blocks, traveling at a low rate of speed. During the chase, Newton failed to stop for stop signs and was not using any lights, including brake lights, as he rode in front of Hartsell's patrol vehicle.
8. The motorbike and Newton together weighed approximately 400 pounds. The police cruiser driven by Hartsell weighed about 4,000 pounds.
9. During the pursuit, Hartsell followed Newton extremely closely at times. His police car collided with the back of the dirt bike 3 to 4 times in rapid succession.

10. Upon the last collision, Newton lost control of the bike and was thrown off of it in front of Hartsell's patrol vehicle.

11. Hartsell managed to stop the patrol car in order to avoid running over Newton, but there were only a few feet between Hartsell's vehicle and Newton when it came to a complete stop.

12. Hartsell was taken to the hospital after the incident. He sustained some scratches, but was not seriously injured.

13. All of these events were captured on video by the dash-cam video camera in Hartsell's patrol car.

Peace Officers and Vehicular Pursuits

14. When a peace officer engages in a vehicular pursuit, the officer must constantly evaluate the conditions of the pursuit and weigh those conditions to determine whether a pursuit should be continued or terminated.

15. For example, the officer should consider the nature of the initial call giving rise to the pursuit, the time of day, weather conditions, roadway conditions, traffic, the safety of the officer, the safety of the person being pursued, and the safety of the public.

16. If the pursuit is continued, the officer must handle his or her vehicle safely and prudently, maintaining an awareness of the relative placements of the vehicles and threats to the safety of the officer, suspect, or public. The officer must maintain a safe following distance of two to three seconds during the pursuit.

17. The Aurora, Missouri, police department also has a policy governing the use of force and vehicular pursuits. The policy prohibits the use of force when reasonable alternatives exist. It also requires officers to weigh safety and seriousness factors when engaging in a

vehicular pursuit. Finally, it states that ramming a vehicle during a vehicular pursuit requires supervisor authorization, and is only permitted when deadly force is authorized. Hartsell was not trained on the policy.

Evidentiary Ruling

At the hearing, the Director presented the testimony of Sergeant Aaron Vaughan, employed by the City of Aurora. Vaughan was the custodian of the video produced by Hartsell's dash-cam video, and he viewed the video using a computer program that provided more information than was available to a viewer who watched the video using commonly available computer software. In particular, Vaughan testified as to the approximate speed of Hartsell's patrol car during the chase. Hartsell objected to the testimony as hearsay, unfair surprise, not the best evidence, and inconsistent with the pleadings, which describe the speeds of both vehicles as "in excess of" eleven miles per hour. We allowed the testimony, but took Hartsell's objection with the case.

We exclude the testimony from our consideration, primarily because in this case it is cumulative. The Director's other expert, Lieutenant Leslie Thurston of the Missouri State Highway Patrol, estimated the speed of the motorbike at 20 to 25 miles per hour, and testified that he was able to estimate the speed from his experience as a driver and as a law enforcement officer operating radar and doing speed enforcement. But in this case, it is sufficient to note that the chase occurred at relatively low speeds. Whether it was closer to 11 or 25 miles per hour is immaterial. What is material is that Hartsell followed Newton too closely, bumped his motorbike several times, and ultimately caused him to fall off the motorbike. Vaughan's testimony is unnecessary to determining our findings of fact and our legal conclusions.

Conclusions of Law

We have jurisdiction over this case. Section 590.080.2.¹ The Director has the burden of proving that Hartsell has committed an act for which the law allows discipline. *See Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989). The degree of proof required is a preponderance of the evidence. *Schumer v. Lee*, 404 S.W.3d 443, 448 (Mo. App. W.D., 2013), citing *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D., 2000). We must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Kerwin v. Missouri Dental Bd.*, 375 S.W.3d 219, 226 (Mo. App. W.D., 2012), citing *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001).

In his complaint, the Director alleges that there is cause for discipline under § 590.080:

1. The director shall have cause to discipline any peace officer licensee who:

* * *

(2) Has committed any criminal offense, whether or not a criminal charge has been filed;

(3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

Section 590.080.1(2)

The Director's complaint charges that Hartsell committed third-degree assault under several subdivisions of § 565.070.1, RSMo 2000, which states:

1. A person commits the crime of assault in the third degree if:

(1) The person attempts to cause or recklessly causes physical injury to another person; or

¹ Statutory references are to the RSMo Cum. Supp. 2013 unless otherwise indicated.

* * *

(3) The person purposely places another person in apprehension of immediate physical injury; or

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative[.]

* * *

2. ...[assault in the third degree] is a class A misdemeanor.

We may determine whether Hartsell committed this criminal offense, whether or not any charges were ever filed against him. *Schumer*, 404 S.W.3d at 447.

We first determine that Newton suffered physical injury, an element of subsection (1). After the incident, he was taken to the hospital. Although the evidence indicates he was not seriously injured, a *serious* injury is not required to meet the requirement of third-degree assault. *State v. Nutt*, 432 S.W.3d 221, 223-24 (Mo. App. W.D., 2014).

Second, we determine that Hartsell placed Newton in apprehension of immediate physical injury, an element of subsection (3). The video in evidence shows that Hartsell followed Newton, who was riding on a small motorbike without a helmet, at a distance so close that Hartsell's patrol car bumped the rider's back three to four times before finally causing the bike to crash and Newton to be thrown from the bike. Although we have no direct evidence of Newton's mental state during this episode, such evidence is unnecessary for our determination. *Schumer*, 404 S.W.3d at 449 (citing appellate opinions concluding there was sufficient evidence to support a criminal conviction for assault in the third degree without the assault victim's testimony). A reasonable person would have been afraid of immediate physical injury in those circumstances.

Third, we determine that Hartsell's conduct, as described above, created a grave risk of death or physical injury to Newton, an element of subsection (4). Any collision between a full-size motor vehicle and a small motor bike creates such a risk to the rider of the motorbike, particularly when the rider is not wearing a helmet.

We are left with determining whether, at the time of the episode, Hartsell possessed the requisite mental state to satisfy the elements of third-degree assault – whether he acted recklessly, purposely, or knowingly. Hartsell argues that we simply do not have enough information about the circumstances to make the determination that he acted with a criminally culpable state of mind. But direct proof of a defendant's mental state is seldom available and is usually inferred from the circumstances. *State v. Light*, 407 S.W.3d 135, 138 (Mo. App. S.D., 2013).

Under § 562.016, RSMo 2000,

2. A person “acts purposely”, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

3. A person “acts knowingly”, or with knowledge,

(1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or

(2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

4. A person “acts recklessly” or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

We also consider that a police officer is allowed to use force that is reasonably necessary. *Neal v. Helbling*, 726 S.W.2d 483, 487 (Mo. App., E.D. 1987). Thus, we modify the standard for

finding recklessness in this case to determine whether Hartsell's conduct was a gross deviation from the standard of care that a reasonable peace officer would exercise.

We determine that Hartsell's conduct fits the criteria for assault in the third degree under § 565.070.1(1), (3), (4) and (5). First, he recklessly caused physical injury to Newton by consciously disregarding a substantial and unjustifiable risk that Newton would be injured by his conduct. As established by expert testimony in this case, Hartsell's disregard of that risk was a gross deviation from the standard of care that a reasonable peace officer would exercise in that situation. Hartsell committed third-degree assault as defined under § 565.070.1(1).

Second, Hartsell purposely placed Newton in apprehension of immediately physical injury. We infer Hartsell's intent from watching the video of the episode in which Hartsell followed Newton's motorbike very closely and bumped into it three or four times. While the first such contact could possibly have been inadvertent, the subsequent contacts likely were not; if Hartsell had wanted to avoid them he could simply have slowed down and increased his following distance. Hartsell committed third-degree assault as defined under § 565.070.1(3).

Third, Hartsell's conduct created a grave risk of death or serious physical injury to Newton. When he engaged in the conduct, he consciously disregarded a substantial and unjustifiable risk of such consequences, and his disregard grossly deviated from the standard of care that a reasonable police officer would exercise in those circumstances. Hartsell committed third-degree assault as defined under § 565.070.1(4).

Fourth, Hartsell knowingly caused physical contact with Newton because he was aware that his police cruiser was bumping the back of Newton's motorbike, and it was practically certain that Newton would find such contact offensive or provocative.

We consider, of course, the fact that Hartsell was pursuing a "suspicious person." Section 563.046.1, RSMo 2000, provides that a law enforcement officer:

need not retreat or desist from efforts to effect the arrest . . . of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. . . . [H]e is . . . justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

But an officer “is prohibited from using any more force than is necessary to effect the arrest; his doing so will constitute an assault.” *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1981). In addition, we must bear in mind that at the time of his pursuit, Hartsell had no reason to *arrest* Newton, only to respond to a call for a suspicious person.

Hartsell argues that we should disregard the expert’s testimony in this case regarding the standard of care because there was no evidence that Hartsell was taught the same principles governing how to conduct vehicular pursuits as were testified to by the expert. In fact, Hartsell denied that he was. But the expert testified that these principles were taught in all POST-certified training classes, and that any reasonably prudent driver – peace officer or no – would have applied these principles. To the extent that Hartsell wants us to find he did not act recklessly because he did not know that a driver should not repeatedly collide with the back of another vehicle, we reject that proposition. Such conduct would be reckless for *any* driver. *See State v. Morrison*, 174 S.W.3d 646, 648 (Mo. App. W.D., 2005) (affirming conviction for third-degree assault of driver who collided with the rear of another vehicle due to excessive speed). And while we understand that it might be acceptable for a police officer under limited circumstances – chasing an armed and dangerous criminal, for example – no such circumstances were present here.

Hartsell also argues that the reason Newton was ejected from his motorbike was not because his patrol car collided with the bike, but because Newton ran over a piece of loose concrete curb in the road. He points to a photograph in the record as depicting the piece of curb.

The photograph is actually a poor-quality photocopy, and it is difficult to discern what it depicts. But having seen the video, we believe the preponderance of the evidence supports the conclusion that it was Hartsell's patrol car, bumping the rear of Newton's motorbike, that caused Newton's ejection.

Hartsell also argues that the reason he repeatedly collided with Newton is that Newton kept braking. Whether true or not, the point is immaterial. Hartsell followed Newton so closely that his conduct can fairly be described as knowing, purposeful, and reckless, as described above.

Hartsell is subject to discipline under § 590.080.1(2).

Section 590.080.1(3)

Hartsell was on active duty when he responded to the call involving the motorbike and during all subsequent events on the morning of August 26, 2012. The Director argues that he acted with moral turpitude, and with a reckless disregard for the safety of the public or any person.

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything "done contrary to justice, honesty, modesty, and good morals."

In re Frick, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)). Hartsell acted recklessly, but we do not believe he intended to injure Newton. We do not find that his actions were base, vile, or depraved. He did not commit an act of moral turpitude.

However, we have already found that Hartsell recklessly engaged in conduct that created a grave risk of death or serious physical injury to Newton. We therefore find that Hartsell is

subject to discipline under § 590.080.1(3) for committing an act with reckless disregard for the bike rider's safety while on active duty.

Summary

There is cause to discipline Hartsell's license under § 590.080.1(2) and (3).

SO ORDERED on November 14, 2014.

\s\ *Karen A. Winn*

KAREN A. WINN

Commissioner